No. 82-737

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ICE CREAM INDUSTRY DRIVERS and ICE CREAM EMPLOYEES UNIONS PENSION FUND ("THE ICE CREAM FUND"),

Petitioners,

vs.

LUCIA NOVEMBRE and ANN DELUCA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief on Behalf of Respondents in Opposition to a Petition for Writ of Certiorari

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QUESTION PRESENTED

Under the facts and circumstances of this case, did the District Court err in estopping Defendant Pension Fund from denying pension benefits to plaintiffs?

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COUNTER STATEMENT OF THE CASE

On July 17, 1950 plaintiff Lucia Novembre went to work for Consumer's Dairy in Union City, New Jersey as an office clerical worker. At that time and until the merger hereafter mentioned the office workers were covered by a collective bargaining agreement between Consumer's Dairy and Local 680. Plaintiff Lucia Novembre was or became a Local 680 member. Starting in 1956 and until the merger hereinafter mentioned the collective bargaining agreement required payment of and Consumer's Dairy did pay pension contributions to Petitioner, Ice Cream Industry Fund for and on behalf of Lucia Novembre.

In October 1, 1958 Consumer's Dairy moved to Newark, New Jersey; thereafter plaintiff Novembre travelled daily from her home in Union City to

Newark, New Jersey.

Effective January 1, 1966 Consumer's was merged into Sealest - the latter taking over all of the operations of Consumer's. For some time prior to January 1, 1966 the Consumer's Dairy employees felt uncertain regarding their employment status after the Sealtest takeover. The Sealtest employees and operation were covered by a collective bargaining agreement with Union Local 607, I.B.T. Therefore, the Consumer employees - members of Local 680 - were deeply concerned regarding their seniority status, pension rights, etc. after the Sealtest - 607 takeover. In order to allay these fears and uncertainties Local 680 sponsored a dinner meeting at the Essex House in Newark, New Jersey on December 28, 1965. All of the drivers, platform, plant and office workers effected by the merger

were invited; approximately 40 attended including plaintiffs.

At this point it is important to note the Union officers and Pension Fund trustees in attendance, on the dais and who spoke, namely:

> Lawrence W. McGinley - President of Local 680 from 1937 to his retirement on December 31, 1972; trustee of the Ice Cream Fund from 1951 to December 31, 1972; trustee of the Milk Industry Fund and its offspring, the 680 Milk Fund from 1949 to December 31, 1972. Mr. McGinley was instrumental in establishing the Milk Industry Fund (A223), the 680 Milk Fund; the establishment of the Ice Cream Fund.
>
> Sidney Bornstein Secretary-Treasurer of Local 607 and trustee of the MIlk Industry Fund.
>
> Tony Iorio - Business agent of Local 680 from January 1, 1952 to December 1973; trustee of the Ice Cream Fund from 1963 to December 1973; Mr. Iorio was also trustee of the Local 680 Milk Fund from 1962 to 1973.

As found by the Trial Court, Mr. McGinley "made a statement to everyone present that the employees would

carry-over their seniority, pay scale and pension credits from Local 680 into Local 607. He informed the audience that there would be no break in their pension benefits...Mr. Iorio made a similar statement which was repeated by Mr. Bornstein. In effect all three gentlemen reiterated that the employees would carry with them their pension benefits. There was no distinction made between what would transpire in respect to the benefits of the drivers as compared to the office workers."(PA9)*

The Trial Court continued (PA9):

> "After the public statements were made the plaintiffs had a private conversation with Mr. Bornstein and Mr. Iorio wherein they both confirmed and reiterated what had been stated publicly, namely, that the employees would carry their pension credits with them into the 607 Local."

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*Refers to Petitioners Appendix.

Starting January 1, 1966 plaintiff Lucia Novembre worked for Sealtest in Newark, New Jersey and became a member of Union Local 607. The collective bargaining agreement between Sealtest and Local 607 required the payment of pension contributions and Sealtest did pay pension contributions, for and on behalf of plaintiff Novembre to the Milk Industry Drivers and Dairy Employees Union Pension & Welfare Fund (Milk Industry Fund). On November 3, 1967, Sealtest moved to the Bronx. Again plaintiff Novembre travelled daily from Union City to her job with Sealtest in the Bronx.*

On February 6, 1970 Sealtest moved to Richmond Hills, Long Island. Again plaintiff Novembre travelled to her job

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*Neither plaintiff drives a car; they rely on public transportation.

from Union City to Richmond Hills even though it took her four to five hours a day travelling via two buses and a train, to and fro.

In 1971, Union Local 607 was merged into defendant Local 584. Also in 1971, the Milk Industry Fund was absorbed by the defendant, Local 584 Pension Trust Fund and Welfare Trust Fund (Local 584 Fund) through merger. Therefore, in 1971, plaintiffs, while working for Sealtest, became members of Local 584 and after 1971 pension contributions on behalf of plaintiff were made by Sealtest into the defendant Local 584 Fund.

On or just prior to November 8, 1974, Sealtest was acquired by Dellwood which moved the operation to Yonkers, New York. The Dellwood operation was covered by another Union Local. Plaintiffs' employment at Dellwood would

have meant a $30.00 cut in pay and the non-recognition of plaintiffs' accrued pension credits. In view of this plaintiffs refused to go to work at Dellwood. Plaintiffs last date of employment at Sealtest was November 8, 1974.

Thus, in reliance upon the representations of McGinley, Iorio and Bornstein, plaintiffs did not seek employment with employers contributing to the Ice Cream Fund although such employment was available; but went to great lengths and inconvenience to retain their position with Sealtest--all in an attempt to preserve their promised pension credits.

Plaintiff DeLuca's employment, union affiliations, employer and union transfers, experience at the December 18, 1965 dinner meeting, pension contributions on her behalf by her

respective employers to the respective pension funds, etc. were the same as co-plaintiff Novembre except that DeLuca was employed by Consumer's Dairy for the period November 1958 to January 1966 and by Sealtest for the period January 1, 1966 to November 1, 1974.

At this point it is important to note the history and inter-relationships of the various pension funds:

HISTORY OF DEFENDANT PENSION FUNDS

On October 24, 1957, and prior thereto, the Milk Industry Drivers & Dairy Employees Unions Pension and Welfare Funds (Milk Industry Fund) constituted a multi-employer/multi-union labor-management fund including (among others) Union Locals 584, 602, 607 and 680. Employers having collective bargaining agreements with said respective Locals paid pension contributions, on behalf of their

covered employees, into said Milk Industry Fund. Six of the ten union trustees administering said Fund were officials of 584, 607 and/680. Lawrence W. McGinley of 680 and John Kelly of 584 were two; Sidney Bornstein of 607 was one of the Union Trustees of said Fund, at least since November 10, 1970.

Effective June 1, 1962, Local 680 separated from said Milk Industry Fund and formed the "Milk Industry - Local 680 Pension and Welfare Fund" (680 Milk Fund). Lawrence W. McGinley was one of the union trustees of said Fund. At the same time, the Milk Industry Fund and the 680 Milk Fund executed a Reciprocity Agreement; i.e., pension credits earned in each Fund are combined in computing the employees' pension eligibility.

The Milk Industry Fund continued as a multi-employer/Locals 584, 602 and 607 Fund until December 3, 1971, when

584 absorbed Locals 607 and 602 through merger. The defendant Local 584 Pension Fund is the successor in interest to the Milk Industry Fund and assumed the obligations of the Milk Industry Fund. John Kelly remained as Trustee of the 584 Pension Fund.

Meanwhile, on October 26, 1964, the 680 Milk Fund had entered into a Reciprocity Agreement with the defendant Ice Cream Industry Pension Fund. Lawrence W. McGinley was one of the trustees of the defendant Ice Cream Fund. Thus all these Funds with interrelated trustees had reciprocity agreements with the lone exception of defendants Ice Cream and 584 Funds.

As we have already stated, on or about November 8, 1974, plaintiffs' employer Sealtest went out of business and plaintiffs found themselves unemployed. Each plaintiff filed an

application with the defendant Funds for a pension, i.e., an early retirement pension. At the time, plaintiff Novembre was fifty-five (55) years of age while plaintiff DeLuca was fifty-eight (58) years of age. Based upon their respective periods of employment, the plaintiffs earned the following pension credits:

	ICE CREAM FUND	584 FUND	TOTAL
Novembre	15 5/12	8 10/12	24 3/12
DeLuca	7 2/12	8 10/12	16

The defendant Funds denied plaintiffs' application for an early retirement pension on the ground that neither plaintiff had the necessary fifteen (15) years of pension credit with either pension Fund - standing alone; and that the pension credits of plaintiffs with each Fund could not, or would not, be combined for the purpose of pension eligibility.

If, as represented by Messrs. McGinley, Iorio and Bornstein at the dinner meeting, plaintiffs' pension credits carried over to Sealtest/584 Fund then plaintiffs would qualify for an early retirement pension, i.e., as of the date of the application they were both over fifty-five (55) years of age and had at least fifteen (15) years of pension credits. Therefore, plaintiffs instituted this suit against defendants for damages on the grounds of misrepresentation and estoppel.

For the reasons set forth in the opinions of the District Court, judgment in favor of plaintiffs and against the defendants, was entered by the District Court. (PA1 et seq and PB1 et seq) The co-defendants, Union Local 584 and Local 584 Fund, paid its pro rata share of the judgment.

Petitioner, Ice Cream Fund and

defendant, Local 680, appealed to the United States Court of Appeals for the Third Circuit. On July 29, 1982, the Third Circuit affirmed the District Court judgment.

REASONS WHY CAUSE SHOULD NOT BE REVIEWED

The District Court applied an estoppel to bar Petitioner, Ice Cream Fund from denying the existence of a reciprocity agreement between it and the co-defendant 584 Fund. This is in the nature of a promissory estoppel. Restatement of Contracts, section 90. Review by this Court of the cause is not necessary because (1) the District Court properly exercised its equitable powers to estop petitioner from denying the existence of reciprocity under the unusal facts and circumstances of this case; (2) the Federal cases declining to apply estoppel against a pension fund

are inapposite; (3) there is no conflict in the Circuits on the issue presented in this case; and (4) this Court has denied review in the similar case of Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398(1981).

A. The "illegality" or "actuarily soundness" basis of those Federal cases which decline to apply estoppel, are not in point here.

Those Circuits which have declined to apply estoppel against the pension fund, have done so on one or both of two bases, to wit:

1. Estoppel against a pension fund would compel the trustees to do an "illegal act." Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1109 (9th Cir. 1976); and

2. A concern that to permit

estoppel might jeopardize the "actuarily soundness" of the fund by imposing liabilities unforeseen by the fund's actuary. Phillips v. Kennedy, 542 F.2d 52,55 at footnote 8, (8th Cir.1976); Moglia v. Geohegan, 403 F.2d 110,116 (2nd Cir. 1968) Cert. denied, 394 U.S. 919 (1969); Hodgins v. Central States Pension Fund, 94 LLRM 2507 (E.D. Mich.1976); Atkin v. IP & GCU Employer Retirement Fund, 604 F2d. 1261,1267-1268 (9th Cir. 1980).

Section 302(c)(5)(B) of the Labor-Management Relations Act (LMRA), 29 U.S.C., Section 186(c)(5)(B) requires that contributions to a pension fund must be made under a "written agreement" and used "for the sole and exclusive benefit of the employees of (the) employer, and their families and dependants".

The "illegal act" which estoppel would force upon trustees, according to

these authorities is: the acceptance of contributions by the Fund from or on behalf of an employee not covered by the Labor Agreement and/or the granting of a pension to such non-covered employee (as in Moglia and Aitkin); or similarly, the acceptance of contributions by a pension fund from, and the granting of a pension to, an employee for and during a period of non-covered employment (as in Thurber and Phillips), would violate Section 306(c)(5)(B).

However, in the case at bar, plaintiffs were covered by a collective bargaining agreement during their entire term of employment with Consumers and Sealtest. The payments made on their behalf by their employers to the respective Funds were made in accordance with a "written agreement" and were in full compliance with Section 302(c)(5)(B).

Therefore, in the case at bar the application of estoppel as against Ice Cream Fund would not compel the trustees to perform an "illegal act".

Nor will the application of estoppel against Petitioner Fund affect its actuarial soundness. The defendant Funds in effect were estopped to deny the existence of the reciprocal agreements which they represented existed. Therefore, defendant Funds were required to pay their Pro-rata share of plaintiffs' respective pensions based upon the benefit level of each Fund for "early retirees". Thus Petitioner must assume 15 5/12ths over 24 3/12ths of the benefit Novembre would have received if she spent the entire 24 3/12ths years with the Ice Cream Fund. Similarly, the Ice Cream Fund must assume 7 2/12ths over 16 of the early retirement pension DeLuca would have

received if she spent the entire 16 years with the Ice Cream Fund. The Ice Cream Fund received pension contributions for each plaintiff covering this exact period. Therefore, the actuarial status or soundness of the Ice Cream Fund will not be affected in anyway. See Rosen, supra, 637 F.2d at p.598.

Moreover, Mr. McGinley told the Trial Court that the actuaries of the Ice Cream Fund had advised the Fund Trustees that the cost of a reciprocal agreement covering plaintiffs would be "minimal."

B. There is no conflict in the Circuits on the issue presented in this case.

We have already discussed the unusual factual situation in the case at bar which compelled the District Court to apply estoppel against the Defendant

Funds. For this reason and the additional reasons discussed under subheading A above, none of the authorities (see Petition pages 12 and 13) discussed this particular issue. Furthermore, the great majority of these cases did not hold that estoppel cannot be applied against a pension fund in a proper case.

The 9th Circuit in Aitkin felt bound by the previous decision in Thurber; however, the Aitkin opinion makes it clear that the Court was "inclined" to apply estoppel against the Fund for the same reasons discussed by the District Court.

In Reiherzer v. Shannon, 581 F2d 1266,1267, footnote 1 (7th Cir. 1978) the Court did not hold that estoppel could not be applied against the Fund, but in a footnote indicated "serious doubts" as to the advisability of

employing estoppel against a Fund.

The oft-cited pronouncement in Phillips v. Kennedy, supra, is pure dicta. In Phillips the Court found in favor of plaintiff--pensioner on the ground that the trustees' denial of the pension was arbitrary and capricious. The Court declined to decide the case on the basis of estoppel. The oft-quoted language of the Court declining to apply estoppel is contained in a footnote. (542 F.2d 55 @ n.8)

Many of the cases found estoppel to be inapplicable since the Court found one or more of its elements had not been established: Feathers v. UMW Health & Retirement Funds, 99 LLRM 2287, 2290 (D.D.C.1978) held that plaintiff failed "to establish any actual evidence of detrimental reliance"; for the same reasons estoppel was rejected in VanGunten v. Central States Etc., 622

F.2d 586,589 (6th Cir. 1982); Haeberle v. Board of Trustees Etc., 624 F.2d 1132,1139 and Michota v. Anheiser Busch, 526 F.Sup. 299, 317, footnote 23 (D.C.NJ 1980)[3]

C. Federal Courts have the equitable power to apply estoppel against a Pension Fund where the facts warrant same.

The 3rd Circuit in Rosen followed Scheuer v. Central States Pension Fund, 358 F. Supp.1332 (E.D. Wisc. 1973), on Rehearing 394 F. Supp. 193 (E.D.Wisc.1975), Aff'd, 570 F.2d 347 (7th Cir.1977) which had a similar factual situation. The 7th Circuit in Scheuer said

"' The sui generis nature of the

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[3]Of course, if Michota's denial of a pension was on the sole issue of estoppel, then the Michota case must be deemed to have been overruled by Rosen, supra.

> pension agreement...should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds...If anything, estoppel is appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them.' The hardship inflicted on those who rely upon promises is often severe." Scheuer, 358 F. Supp. at p.1338 quoted in Rosen, 637 F.2d at p. 598.

Moreover Federal Courts have broad equitable powers to grant and/or fashion relief to carry out the congressional intent. J.I.Case Co. v. Borak, 377 U.S.426,433 (1964).

The dictum in Phillips v. Kennedy, supra, that estoppel against a pension fund may be applied in "extraordinary circumstances" is but another expression of this equitable doctrine.

CONCLUSION

For the reason expressed above this cause should not be reviewed by this Court.

Respectfully submitted,

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